APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED MARCH 26, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of March one thousand nine hundred and ninety-eight.

PRESENT:

Hon. Richard J. Cardamone,
Hon. John M. Walker, Jr.,
Hon. Frank J. Magill,*
Circuit Judges.

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* The Honorable Frank J. Magill, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix A

No. 97-7884

S.A. LUDSIN & CO., doing business as S.A. Ludsin & Co.,

Plaintiff-Appellant,

v.

UNITED STATES SMALL BUSINESS ADMINISTRATION,

Defendant-Appellee.

APPEARING FOR APPELLANT:
Steven A. Ludsin, Esq., *Pro se*
East Hampton, New York

APPEARING FOR APPELLEE:
Sean C. Cenawood, Kathy S. Marks,
Assistant United States Attorneys
(Mary Jo White, United States Attorney)
New York, New York

Appeal from the United States District Court for the Southern District of New York (Andrew J. Peck, *Magistrate Judge*).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

Appendix A

Plaintiff-appellant Steven A. Ludsin, d/b/a S.A. Ludsin & Co. ("Ludsin"), appearing *pro se*, appeals from the order of the United States District Court for the Southern District of New York (Andrew J. Peck, *Magistrate Judge)* granting defendant-appellee U.S. Small Business Administration's ("SBA") motion for summary judgment in Ludsin's action for an order requiring the SBA to produce certain appraisals of SBA collateral purchased ("COLPUR") real estate without imposition of search and duplication fees, pursuant to the fee-waiver provision of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(A)(iii). We affirm.

On June 12, 1995, Ludsin entered into a contract with the SBA to market and sell COLPUR real estate. Ludsin was to receive a commission for any properties sold through his efforts. On January 29, 1996, Ludsin made a FOIA request for appraisals of the COLPUR properties. The SBA expressed its willingness to provide the appraisals upon Ludsin's advancement of $10,250, the estimated cost of gathering and copying the appraisals. *See* 5 U.S.C. § 552(a)(4)(A)(v) (agency may require advance payment if fee exceeds $250). Ludsin offered to pay the fee out of commissions earned from sales of the property, but the SBA rejected this proposal, asserting that such an arrangement was not authorized under FOIA. On March 25, 1996, Ludsin filed a complaint in the district court seeking an order directing the SBA to provide him with the COLPUR appraisals without payment of a fee. In addition, Ludsin pursued administrative remedies within the SBA itself. After judicially sponsored settlement efforts failed, the SBA moved for summary judgment in the district court.

Under FOIA, agencies may charge reasonable fees for document search and duplication costs. 5 U.S.C. § 552(a)(4)(A). These fees should be reduced or waived "if disclosure of the

information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). We review the SBA's decision that Ludsin was not entitled to a fee waiver *de novo*, but "the court's review of the matter shall be limited to the record before the agency." 5 U.S.C. § 552(a)(4)(A)(vii); *see also Carney v. United States Dep't of Justice*, 19 F.3d 807, 814 (2d Cir. 1994). Ludsin bears the burden of demonstrating his entitlement to a fee waiver. *See id.*

Ludsin failed the first prong of this test, because his request for documents was not in the public interest. For the most part, Ludsin's submissions to the SBA merely paraphrased the language of the FOIA fee waiver provision, and such conclusory statements do not satisfy the statute. *See Sloman v. United States Dep't of Justice*, 832 F. Supp. 63, 67-68 (S.D.N.Y. 1993). His only substantive claim before the SBA was that disclosure would serve the "public interest" by creating revenue for the federal government by facilitating sale of COLPUR properties. However, FOIA permits fee waivers when the requested information is likely to contribute to public understanding of the operations and activities of government, not when it is likely to increase public revenue. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Ludsin has not demonstrated that disclosure is in the public interest for purposes of a FOIA fee waiver.

Because Ludsin has failed the first prong of this test, there is no need to consider the second prong — whether disclosure is "primarily in the commercial interest of the requester." *Id.*

We have considered Ludsin's other arguments on appeal, and find them to be without merit.

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For the reasons set forth above, the judgment of the district court is AFFIRMED.

FOR THE COURT:

s/ Lucille Carr
GEORGE LANGE III, Clerk
by: Lucille Carr, Deputy Clerk

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 18, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 Civ. 2146 (AJP)

S.A. LUDSIN & CO.,

Plaintiff,

- against -

U.S. SMALL BUSINESS ADMINISTRATION,

Defendant.

OPINION AND ORDER

ANDREW J. PECK, United States Magistrate Judge:

The issue before the Court in this Freedom of Information Act ("FOIA") case is whether plaintiff Steven Ludsin d/b/a S.A. Ludsin & Co. ("Ludsin") is entitled to a FOIA fee waiver from defendant U.S. Small Business Administration ("SBA"). While Ludsin conclusorily claims that the fee waiver is justified because his FOIA request will promote public understanding of government and is not primarily in his commercial interest, the record is to the contrary. Accordingly, for the reasons set forth below, the Court grants defendant's summary judgment motion.[1]

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1. The parties have consented to disposition of this case by a Magistrate Judge pursuant to 28 U.S.C. § 636(c).

(Cont'd)

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FACTS

The FOIA's Fee Waiver Provision

In order to understand the facts, a very brief introduction to the FOIA's fee and fee waiver provisions is required. The FOIA allows agencies to charge reasonable fees for document search and duplication costs to respond to FOIA requests. 5 U.S.C. § 552 (a) (4) The FOIA provides an exemption or reduction of fees, however, in "public interest" situations:

> Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 522(a)(4)(iii). With this background, we turn to the facts of Ludsin's request.

Ludsin's Contract With the SBA

On June 12, 1995, Ludsin entered into a contract with the SBA to market and sell SBA collateral purchased ("COLPUR") real estate. (SBA 3 (g) ¶ 2; Declaration of Beverly Linden, Chief of the SBA FOIA Office, ¶ 5 & Ex. B.) The contract gave Ludsin

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The Court notes that while Ludsin is appearing "pro se," he is an attorney. (*See* Declaration of Susan D. Baird, dated June 28, 1996, ¶¶ 4, 6-7.) Despite this, he has failed to follow basic court rules, including failing to file a Local Rule 3 (g), now Local Rule 56.1, statement.

nonexclusive rights for a 12-month period to market the SBA's approximately 470 COLPUR properties on the Bloomberg financial computer network, with Ludsin to receive a commission for any properties sold through his efforts. (Linden Decl. ¶ 5 & Ex. B at p. C-2; SBA 3 (g) ¶ 2.)

Ludsin's FOIA Request and Subsequent Fee Waiver Denial

By letter dated January 29, 1996, Ludsin made a FOIA request for "[a]ll appraisals for the real estate comprising the COLPUR portfolio I am selling as a SBA contractor on the Bloomberg Financial Markets System." (SBA 3 (g) ¶ 1; Linden Decl. ¶ 4 & Ex. A ¶ 1.) Ludsin stated that the "information is imperative in order to complete a transaction" to sell certain COLPUR property. (Linden Decl. Ex. D.)[2]

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2. Ludsin's January 29, 1996 FOIA request itself was a division of his prior January 8, 1996 FOIA request into several separate requests. *(See* Linden Decl. Ex. A: 1/29/96 Letter, first paragraph.) Ludsin's January 8, 1996 letter clearly stated the commercial purpose of his FOIA request:

> *In order to accomplish the sale of the SBA's COLPUR real estate portfolio* on the Bloomberg Financial Markets System ("Bloomberg") *pursuant to contract* SBAHQ 95C006 awarded to S.A. Ludsin & Co. *I hereby file a Freedom of Information Act (FOIA) request.* . . .
>
> On November 3, 1995 I advised the SBA of my intention and capability to scan the appraisals and photographs into the Bloomberg in order to market the COLPUR portfolio innovatively. . . . This nonperforming portfolio can only be marketed if we have the appraisals . . . and then be able to scan that information into the Bloomberg. . . .

(Cont'd)

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On February 20, 1996, the SBA responded to Ludsin's FOIA request by expressing their willingness to provide property descriptions from the appraisals from SBA field offices in order "to help sell the COLPUR properties." (Linden Decl. ¶ 6 & Ex. C.) That same day, Ludsin wrote the SBA that:

> I expect to receive those appraisals to scan into the Bloomberg for purposes of attracting other buyers and a due diligence document. Anything less than the full appraisals I would deem to be a denial of the first part of my FOIA request and I will appeal.

(Linden Decl. ¶ 7 & Ex. D.) On February 22, 1996, Ludsin again wrote to the SBA to appeal what he interpreted as a denial of his FOIA request, and to provide additional justification:

> Disclosure of the documents I requested is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest. The ability to market the COLPUR assets and raise revenues through the sale of the COLPUR assets is in the public interest. Although *I am a commercial entity with a government contract, the information I requested enhances the*

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> *The ability to successfully accomplish the sale of the COLPUR real estate portfolio* mandates this loan information to be scanned into the Bloomberg in a prompt and timely manner which *is best achieved through the FOIA request.*

(Linden Decl. Ex. A: 1/8/96 Ludsin letter attached to 1/29/96 letter, emphasis added.)

likelihood of a sale and the creation of revenues for the U.S. government.

(SBA 3 (g) ¶ 4, emphasis added; Linden Decl. ¶ 8 & Ex. E, emphasis added.)

By letter dated March 11, 1996, the SBA informed Ludsin that it was treating his February 22, 1996 "appeal" as a supplement to his initial FOIA request, and that the SBA would provide the requested information on advance payment of the estimated $10,250 cost of gathering and copying the appraisals:

> This information gathering is a very time consuming effort requiring significant resources to search and review the requested information. While the requested material is routinely collected by SBA, the information is located in the loan files in SBA's 87 field offices. The gathering, compiling and appropriate editing impose a significant burden on Agency staff.
>
> . . . .
>
> Under the FOIA we are mandated to charge certain fees for providing this information. We estimate that amount to be $10,250.00 which includes search, review, and copying time. This amount is based on our estimate of 500 hours (approximately 1 hour per appraisal) to review the appraisals and collect this information and copying the appraisals at ten cents a page. The hourly rate charged by SBA is mandated under 13 CFR 102.8 (a) (1) and (3) and is $18. The ten cents a page copying charge is mandated under 13 CFR 108 (a) (4). Amounts in excess of $250 may

> be collected in advance by SBA. *I am requesting that you submit a check in the amount of $10,250.00 made out to the SBA for the FOIA information requested. As soon as we receive your check, we will begin processing your FOIA request.*

(Linden Decl. Ex. I, emphasis added; *see also* SBA 3(g) ¶ 3; Linden ¶ 12.

By letter dated March 25, 1996, Ludsin offered to pay the $10,250 fee out of commissions he later would earn on sales of the COLPUR property:

> I spoke with Robin O. Clay, . . . and he suggested I direct my correspondence to you regarding my willingness to pay the $10,250.00 fee for the appraisals *in the interest of seeing this contract to its successful completion.* . . . I am *willing to pay the fee for the appraisal request out of my commission earned when a sale is accomplished.*

(Linden Decl. Ex. K, emphasis added; *see also* Linden Decl. ¶ 14.) The SBA rejected Ludsin's proposal as not authorized under the FOIA. (Linden Decl. ¶ 15 & Ex. L.)

Ludsin's Complaint and FOIA Appeal Within the SBA

Ludsin filed his complaint in this action on March 25, 1996 alleging, inter alia, that:

> The SBA's attempt to charge $10,250.00 in fees for [the] records is improper because the disclosure of the information is in the public interest and it is likely

> to contribute significantly to public understanding of the operations or activities of the Government. The demand for fees is arbitrary and capricious, *designed to thwart the plaintiff in performing his contract* and effectively penalizes him for invoking his rights under the FOIA laws.

(Cplt. ¶ 10, emphasis added.)[3]

By letter dated March 29, 1996, Ludsin filed an appeal with the SBA, challenging the $10,250.00 fee assessment. (SBA 3(g) ¶ 5; Linden Decl. ¶ 16 & Ex. M.) Ludsin reiterated his contention that a fee waiver was justified because his request was in the public interest:

> The reasons I believe the fee should be zero is that the disclosure of the information (the appraisals of the COLPUR real estate portfolio) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester, an SBA Contractor. . . . Although the SBA may not deem the full appraisals a requirement of my contract performance, *I was hired to innovatively market the COLPUR portfolio and the use of the appraisals* to be scanned into the Bloomberg Financial Markets System . . . *is a requirement of my contract performance.*

(Linden Decl. Ex. M, emphasis added.)

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3. The complaint does not challenge the SBA's calculation of the fee, if a fee is warranted, but merely requests waiver of the fee.

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In response, on April 25, 1996, the SBA wrote Ludsin that his FOIA fee waiver appeal would be suspended because of this pending lawsuit. (Linden Decl. ¶ 17 & Ex. N.) Pursuant to a Stipulation and Order dated June 17, 1996, both parties agreed to have the SBA rule on Ludsin's FOIA fee appeal. On July 11, 1996, the SBA affirmed the denial of Ludsin's request for a FOIA fee waiver, stating:

> At the outset we note that according to your letter of February 22, 1996, *you are "a commercial entity with a government contract,* and that the information that [you] requested enhances the likelihood of a sale and the creation of revenues for the U.S. Government." In light of the fact that *the information which you seek is not likely to contribute significantly to the public's understanding of the operations or activities of the government (since it pertains exclusively to the description and value of property), and that such disclosure will be primarily in your commercial interest (as is clearly demonstrated by the subject contract awarded to you)*, SBA must affirm the original determination that *a waiver of the processing fees in this matter is not appropriate.*

(Linden Decl. ¶ 18 & Ex. 0, emphasis added; SBA 3(g) ¶ 6.)

After judicially sponsored settlement efforts failed,[4] this motion followed.

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4. In an effort to settle the case, the SBA agreed to "provide to plaintiff [without fee the] appraisals, in their entirety except for dollar valuation information (which will be redacted), of the entire current SBA Collateral Purchased (COLPUR) real estate portfolio, in the SBA's possession, by January 2, 1997." (Cont'd)

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ANALYSIS

I. THE STANDARD OF JUDICIAL REVIEW

The FOIA specifies that judicial review of an agency's fee waiver decision be *de novo,* but based solely on the record before the agency:

> In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided,* That the court's review of the matter shall be limited to the record before the agency.

5 U.S.C. § 552 (a) (4) (A) (vii) ; *see also, e.g.* , *Carney* v. *United States Dep't of Justice,* 19 F. 3d 807, 814 (2d Cir. 1994); *Sloman* v. *United States Dep't of Justice,* 832 F. Supp. 63, 67 (S.D.N.Y. 1993); *Larson* v. *Central Intelligence Agency*, 843 F.2d 1481, 1483 (D.C. Cir. 1988).

II. THE FOIA'S TWO PRONG TEST FOR A FEE WAIVER

The FOIA's fee waiver provision sets forth two requirements, both of which must be satisfied before any fees can be waived or reduced:

(Cont'd)

(Stipulation and Order, dated September 25, 1996.) By January 8, 1997, the SBA had provided Ludsin with approximately 313 COLPUR appraisals, representing the entire "current" portfolio. The SBA omitted approximately 110 appraisals of property either already sold, under contract, or determined by the SBA to be unmarketable. (1/8/97 Tr. at 2.) Because the unmarketable properties technically are considered part of the SBA COLPUR portfolio, and because Ludsin insisted on obtaining those appraisals, the Court held that there was not "complete compliance with the settlement stipulation," and thus set a briefing schedule for this motion. *(Id.* at 3-5.)

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> Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is [1] *in the public interest* because it is likely to contribute significantly to public understanding of the operations or activities of the government *and* [2] is *not primarily in the commercial interest* of the requester.

5 U.S.C. § 552 (a) (4) (A) (iii) (emphasis & bracketed material added); *see also, e.g.* , *Sloman* v. *United States Dep't of Justice,* 832 F. Supp. at 67 ("Thus the statute sets forth a two-pronged analysis to determine whether a fee waiver is appropriate."); *Larson* v. *CIA,* 843 F.2d at 1483 (the FOIA's "fee waiver test provides a two-pronged analysis").

Plaintiff Ludsin carries the burden of proof on both prongs as the requester of the information under FOIA. *See, e.g., Carney v. United States Dep't of Justice,* 19 F.3d 807, 814 (2d Cir. 1994); *Sloman* v. *United States Dep't of Justice,* 832 F. Supp. at 67; *National Treasury Employees Union* v. *Griffin,* 811 F.2d 644, 647 (D.C. Cir. 1987) Thus, "[t]o establish his right to a fee waiver under the public interest provision, the burden was on [Ludsin] to establish that the disclosure of information was in the public interest and was not primarily in his commercial interest." *Carney* v. *United States Dep't of Justice,* 19 F.3d at 814.

A. Ludsin Fails the First Prong of the Fee Waiver Test Because His Request is Not in the Public Interest

In an attempt to satisfy the first prong of the statutory test, Ludsin asserted to the SBA that:

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> Disclosure of the documents I requested is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest. The ability to market the COLPUR assets and raise revenues through the sale of the COLPUR assets is in the public interest. Although I am a commercial entity with a government contract, the information I requested enhances the likelihood of a sale and the creation of revenues for the U.S. government.

(SBA 3 (g) ¶ 4; Linden Decl. ¶ 8 & Ex. E.)[5]

To a large extent, Ludsin's "public interest" justification merely paraphrases the statute. However, "merely quoting the statutory language does not satisfy the first prong of the test." *Sloman* v. *United States Dep't of Justice,* 832 F. Supp. at 68. " 'If such conclusory statements supported a fee waiver for this request, then similar statements could support fee waivers for even broader requests.' " *Sloman* v. *United States Dep't of Justice,* 832 F. Supp. at 67-68 (quoting *McClellan Ecological*

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5. On his FOIA administrative appeal, Ludsin restated this position by again paraphrasing the statutory language:

> The reason I believe the fee should be zero is that the disclosure of the information (the appraisals of the COLPUR real estate portfolio) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester, an SBA Contractor.

(Linden Decl. Ex. M.)

Seepage Situation v. *Carlucci,* 835 F.2d 1282, 1285 (9th Cir. 1987)). Thus a requester must assert his justifications with reasonable specificity. *See, e.g., McClellan Ecological Seepage Situation* v. *Carlucci,* 835 F.2d at 1285. " '[T]he agency may infer a lack of substantial public interest "[w]hen a public interest is asserted but not identified with reasonable specificity, and circumstances do not clarify the point of the request." ' " *Larson* v. *CIA,* 843 F.2d at 1483 (quoting *McClellan Ecological Seepage Situation* v. *Carlucci,* 835 F.2d at 1285).

The only justification beyond a mere recitation of the statutory language that Ludsin offered the SBA is that the "creation of revenue" for the federal government from the sale of COLPUR property is in the public interest. However, this is insufficient to merit a fee waiver

The FOIA defines the "public interest" as information that is "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552 (a) (4) (A) (iii). The Second Circuit has explained that "[i]n determining whether disclosure of records will contribute significantly to the public's understanding of the operation or activities of the government, it is relevant to consider the subject matter of the requests and the ability of the requester to disseminate the information." *Carney* v. *United States Dep't of Justice,* 19 F.3d 807, 814 (2d Cir. 1994). This Court also agrees with the Ninth Circuit that a "requester's motive for seeking disclosure is a factor for an agency to consider in evaluating the likely effect of disclosure on public understanding." *McClellan Ecological Seepage Situation* v. *Carlucci,* 835 F.2d at 1287 n.4.

The subject matter of Ludsin's FOIA request, appraisals of SBA property, does not in any readily apparent way contribute

to the public's understanding of the operation or activities of the government. Further, it is clear from Ludsin's contract with the SBA and the commercial nature of his request that Ludsin's motive is his private financial gain. These two factors weigh against a fee waiver. Finally, although placing the appraisals on the Bloomberg network may allow their wide dissemination, the appraisals' subject matter makes this factor irrelevant; if the subject matter does not concern the operations or activities of the government, then a wide dissemination of the material will not contribute to the public's understanding of these matters.

In short, while sale of this property would benefit the public treasury, that commercial interest (of the government and of Ludsin) is not the "public interest" understanding of the operation of the government required for a FOIA fee waiver.

Ludsin's brief in this Court provides further reasons for the fee waiver. First, Ludsin argues that the information provides the public with an understanding of how the SBA liquidates its property. (Ludsin Br. at 9-10.) Second, Ludsin claims that the information allows potential buyers to read descriptions of the property before actually visiting it. Third, Ludsin asserts that the public is benefited because no one has previously placed appraisals on the Bloomberg network. (*Id.*)

Since Ludsin did not provide these reasons to the SBA when pleading his case for a fee waiver, the Court cannot consider them. 5 U.S.C. § 552 (a) (4) (A) (vii) . Even if the Court were to consider these proposed justifications, however, they fall far short of the requirements needed for a public interest fee waiver. The second and third justifications are that the public will benefit from the more efficient sale of these properties — but increased government revenue is not the same as the "public interest" under

FOIA. The first justification — how the SBA liquidates property — might in other cases be in the public interest, but Ludsin does not explain to the Court (and certainly never explained to the SBA) how disclosure of appraisals to him provides any explanation to the public about how the SBA liquidates its properties. Ludsin has never expressed any interest in analyzing the data for that purpose; he has merely stated his intent to put the raw data on the Bloomberg computer system to enhance sales of the properties. Thus, none of his belated justifications are sufficient, even if the Court could consider them.

The Court finds that the SBA properly concluded that Ludsin's request was not "in the public interest" and properly denied his request for a fee waiver.

B. Ludsin is Not Entitled to a Fee Waiver Because the Request is Primarily in His Commercial Interest

As discussed above, for there to be a fee waiver, a requester need prove that his request is both in the "public interest" and "not primarily in [his] commercial interest." 5 U.S.C. § 552(a) (4) (A) (iii). Since Ludsin has failed to satisfy the public interest prong, the Court need not even consider the second prong. Nevertheless, even if Ludsin had satisfied the first prong, the record is crystal clear that Ludsin's request is for his own "commercial interest," and thus should be denied under the second prong.

SBA regulations define a commercial requester for FOIA purposes as "anyone seeking information for commercial, trade, or profit interests of the requester or someone he or she is trying to help." 13 C.F.R. § 102.8(d) (1997); *see also, e.g., Sloman* v. *United States Dep't of Justice,* 832 F. Supp. at 68 (quoting similar

DOJ definition). Under his SBA contract, plaintiff Ludsin will receive a percentage commission on all COLPUR property sold by the SBA through his marketing efforts. This considerable profit motive demonstrates that commercial interests underlie Ludsin's request.

Aside from his *ipse dixit* restating the statutory language that the request is not in his commercial interest (*see* Linden Decl. Exs. E & M.), Ludsin offers no justification as to why he is not a commercial requester. In fact, Ludsin's FOIA requests to and correspondence with the SBA are replete with references to his contract with the SBA for the sale of the COLPUR properties. Some examples:

> • FOIA request for "[a]ll appraisals for the real estate comprising the COLPUR portfolio *I am selling as a SBA contractor* on the Bloomberg Financial Markets System." (Linden Decl. Ex. A: 1/29/96 Ludsin FOIA Letter to SBA, emphasis added; *accord,* Linden Decl. Ex. E: 2/22/96 Ludsin Letter to SBA.)
>
> • "In order to *accomplish the sale of the SBA's COLPUR real estate portfolio . . . pursuant to contract* . . . awarded to S.A. Ludsin & Co. I hereby file a Freedom of Information Act (FOIA) request. . . ." (Linden Decl. Ex. A: 1/8/96 Ludsin FOIA Letter to SBA, emphasis added.)
>
> • "The ability *to successfully accomplish the sale of the COLPUR* real estate portfolio mandates this loan information to be scanned into the Bloomberg in a prompt and timely manner which *is best achieved through the FOIA request."* (*Id.*, emphasis added.)

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• "Although *I am a commercial entity with a government contract,* the information I requested enhances the likelihood of a sale and the creation of revenues for the U.S. Government." (Linden Decl. Ex. E: 2/22/96 Ludsin Letter to SBA, emphasis added.)

• "I am willing to pay the fee for the appraisal request out of my commission earned when a sale is accomplished." (Linden Decl. Ex. K: 3/25/96 Ludsin Letter to SBA.)

• "Although the SBA may not deem the full appraisals a requirement of my contract performance, I was hired to innovatively market the COLPUR portfolio and *the use of the appraisals* to be scanned into the Bloomberg. . . . *is a requirement of my contract performance."* (Linden Decl. Ex. M: 3/29/96 Ludsin FOIA Appeal Letter to SBA, emphasis added.)[6]

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6. Ludsin's brief to this Court merely underscores the commercial nature of his FOIA request. For example, Ludsin states that he "will use the information to liquidate U.S. Government assets with a modern method, which is not primarily in the plaintiff's commercial interest. The existence of the contract awarded to the plaintiff underscores the fact that the Government needed assistance from the private sector, and the goals of the contract are clearly in the public interest since the revenues will flow into the U.S. Treasury." (Ludsin Br. at 2-3; *see also id.* at 6 (the fee demand is "designed to thwart the plaintiff in performing his contract"), 18 ("although the plaintiff could be deemed a commercial requester, it is the use that determines whether a fee waiver is justified. The plaintiff [is] a contractor of the SBA. . . . The use of the appraisals was to enhance the likelihood of asset disposition.") .)

In short, plaintiff's status as a "commercial" requester is beyond serious dispute.

Plaintiff Ludsin, in his brief, suggests a "balancing" test, that is, that the "magnitude of [his] identified commercial interest is sufficiently small in comparison with the public interest in disclosure of the appraisals of the COLPUR real estate." (Ludsin Br. at 11.) Ludsin premises his argument on the fact that the revenue to the government from COLPUR sales would be far greater than the amount of his sales commissions. (*Id.*)

There is some case support for such a balancing test. *See, e.g., National Treasury Employees Union* v. *Griffin,* 811 F.2d 644, 648 (D.C. Cir. 1987) (a fee waiver or reduction must "primarily benefit the public" and "[w]hen furnishing requested information is likely to provide both public and private benefits, the agency must determine which benefit is primary.")[7] *Ettlinger*

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7. The D.C. Circuit noted that the "legislative history of the fee waiver provision indicates special solicitude for journalists, along with scholars and public interest groups." *Id.*, 811 F.2d at 649; *see also, e.g., Better Gov't Ass'n* v. *Department of State,* 780 F.2d 86, 93-94 (D.C. Cir. 1986) ("The appellants are nonprofit public interest groups that routinely make FOIA requests that potentially would not be made absent a fee waiver request. . . . This waiver provision was added to FOIA . . . in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups."); John E. Bonine, *Public Interest Fee Waivers Under the Freedom of Information Act,* 1981 Duke L.J. 213, 259-60 ("The purpose and legislative history of the Freedom of Information Act point to two groups of requesters whose fees should generally be waived. The first group consists of journalists, scholars, and authors. These persons confer a public benefit by disseminating information to others, thereby multiplying the benefit obtained from a single release of documents. The second group of requesters generally entitled to fee waivers is persons making requests for nonprofit purposes. Granting fee waivers to requests made for nonprofit purposes encourages participation in the governing process by those without a direct motivation to do so.") (footnote omitted). Ludsin, of course, falls in none of these favored categories.

v. *Federal Bureau of Investigation,* 596 F. Supp. 867, 877 (D. Mass 1984) (to justify a fee waiver, private gain is weighed against plaintiff's purpose of widely disseminating information to public); *Rizzo* v. *Tyler,* 438 F. Supp. 895, 900 (S.D.N.Y. 1977) (alleged public interest of educating public of Justice Department's efforts to combat organized crime is weighed against the private benefit to plaintiff from disclosure of his own records for his benefit in defending against criminal charges; public interest claim found to be frivolous). Even under the balancing approach, however, Ludsin's FOIA fee waiver request should be denied. The private, commercial benefit to Ludsin is clear. The public benefit, however, is not. First, the public benefit is financial, not the public understanding of government operations that Congress defined as the "public interest" to be considered in FOIA fee waiver requests. Second, even if the Court were to consider the governmental interest in revenue from the sale of COLPUR property, Ludsin's waiver request fails. The FOIA has provided Ludsin with the requested appraisals for the COLPUR property it considers saleable; it did not provide him with appraisals for property already sold or under sales contract, or considered unmarketable by the SBA. (*See* fn. 4, above.) Thus, Ludsin has not demonstrated that providing him with these additional appraisals would generate any additional revenue for the government. Ludsin's request is private and commercial, and even if a balancing test were appropriate, it would not justify a fee waiver for Ludsin.

CONCLUSION

For the reasons set forth above, defendant SBA's summary judgment motion is granted. The Clerk of Court is directed to enter judgment for defendant SBA dismissing this action with prejudice

Appendix B

SO ORDERED.

DATED: New York, New York
June 18, 1997

s/ Andrew J. Peck
Andrew J. Peck
United States Magistrate Judge

Copies to:
Steven A. Ludsin
Sean C. Cenawood, Esq.

APPENDIX C — LETTER FROM BEVERLY K. LINDEN, CHIEF, FREEDOM OF INFORMATION/PRIVACY ACTS OFFICE TO MR. STEVE LUDSIN DATED JULY 11, 1996

U.S. SMALL BUSINESS ADMINISTRATION
Washington, D.C. 20416

FEDERAL EXPRESS

July 11, 1996

Mr. Steve Ludsin
S.A. Ludsin & Co.
555 Madison Avenue, 31st Floor
New York, New York 10022

Re: *S.A. Ludsin & Co.*

Dear Mr. Ludsin:

In accordance with the Stipulation and Order in this matter dated June 17, 1996, the Small Business Administration (SBA) hereby renders its decision regarding your appeal from the SBA's initial denial of your request for a waiver of Freedom of Information Act processing fees.

At the outset we note that according to your letter of February 22, 1996, you are "a commercial entity with a government contract, and that the information that [you] requested enhances the likelihood of a sale and the creation of revenues for the U.S. Government." In light of the fact that the information which you seek is not likely to contribute significantly to the public's understanding of the operations or activities of the government (since it pertains exclusively to the description and value of

property), and that such disclosure will be primarily in your commercial interest (as is clearly demonstrated by the subject contract awarded to you), SBA must affirm the original determination that a waiver of the processing fees in this matter is not appropriate.

Please be assured, however, that upon payment by you of the estimated fees of $10,250, the requested documents will be assembled, and the requested information will be released to you except for those portions related to the properties' valuation, which is confidential and privileged under exemptions 4 and 5 of the Act.

You should also be aware that certain of the data which you seek eventually may be made available by the SBA to the general public via the Internet at no charge. As of this date, however, we do not know when such general availability will be effectuated, but we are hopeful that it will be available by the end of the calendar year. Thus, if you should conclude that you wish access to all requested non-exempt information as of the present time, payment of the estimated processing fees will be necessary.

Sincerely,

Beverly K. Linden
Chief, Freedom of Information/
Privacy Acts Office